LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 1 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 417

OCTOBER TERM, 1969

ERNEST LEE GORDON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

ABRAHAM GERTNER
37 West Broad Street
Columbus, Ohio 43215
Counsel for Petitioner
and
WALKER J. BLAKEY
37 West Broad Street
Columbus, Ohio 43215

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

	Page
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Statute and constitutional provisions involved	2
Statement of the case	3
Reasons for granting the writ	6
Conclusion	9
Appendix—Opinions and judgment below	10
Entry in the Supreme Court of Ohio on the appeal from the Court of Appeals May 21, 1969	10
Entry in the Supreme Court of Ohio on the motion for leave to appeal from the Court of Appeals May 21, 1969	10
Entry in the Ohio Tenth District Court of Appeals filed December 30, 1968	10
Decision of the Ohio Tenth District Court of Appeals rendered October 29, 1968	11
Decision of the Ohio Tenth District Court of Appeals rendered October 8, 1968	11
Decision of the Ohio Tenth District Court of Appeals rendered September 10, 1968	13
Decision of the Court of Common Pleas of Franklin County, Ohio rendered September 19, 1967	15

CITATIONS

Cases:

Davis v. United States, 279 F.2d 127	9
Desmond v. United States, 345 F.2d 225	8
Garcia v. United States, 315 F.2d 133	9
Griffin v. California, 380 U.S. 609	2, 4, 6, 7, 8
Leathers v. United States, 250 F.2d 159	9
People v. Norton, 285 App. Div. 1165	8

Page

State v. Baker, (Mo.) 4 Crim. Law Reporter 2520 (decided March 10, 1969) 7, 9
State v. Davis, 10 Ohio St. 2d 136 5
State v. Glaros, 170 Ohio St. 471 5
State v. Minamyer, 12 Ohio St. 2d 67 5
State v. Murphy, 13 Ohio App. 2d 159 ..... 4, 9
State v. Perkins, (Mo.) 382 S. W. 2d 701 9
Street v. State, 266 Ala. 289 8
Traylor v. State, 111 Tex. Crim. 58 8
United States v. Johnson, 337 F.2d 180, aff'd (on other questions) 383 U.S. 169 ..... 4, 6, 9, 14
United States v. Wright, 309 F.2d 735, cert. denied, 372 U.S. 929 ..... 4, 6, 9, 14
Watson v. State, 171 Tex. Crim. 526 8

Statute:

28 U.S.C., Sec. 1257 (3) 2

United States Constitution:

Fifth Amendment 2, 3, 4
Fourteenth Amendment 3, 4

Miscellaneous:

14 A.L.R. 3d 723 ..... 7, 8
XLII Ohio Bar No. 21:
P. 731 1
P. 732 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

ERNEST LEE GORDON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on the 21st day of May, 1969, dismissing Petitioner's appeal as of right and overruling Petitioner's motion for leave to appeal.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court overruling the motion for new trial is unreported and is printed in the Appendix *infra* p. 15. The four opinions of the Tenth District Court of Appeals are unreported and are printed in the Appendix *infra* p. 10, p. 11, p. 11, and p. 13. No opinion was rendered by the Supreme Court of Ohio. The dismissal of the appeal as of right is reported XLII Ohio Bar No. 21, p. 731 and printed in the Appendix *infra* p. 10. The overruling of the

motion for leave to appeal is reported XLII Ohio Bar No. 21, p. 732 and printed in the Appendix, *infra,* p. 10.

JURISDICTION

The dismissal of Petitioner's appeal as of right and the overruling of Petitioner's motion for leave to appeal were both entered by the Supreme Court of Ohio, the highest state court in which a decision could be had, on May 21, 1969. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether a prosecuting attorney may evade the rule announced by this court in *Griffin v. California,* 380 U.S. 609, that the Fifth Amendment forbids comment on a defendant's failure to take the stand by making comments whose purpose and effect is to emphasize to the jury that the defendant did not take the stand but which are phrased as comments on the defendant's "failure to offer evidence".

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C., Sec. 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Amendment XIV:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury in the Court of Common Pleas of Franklin County, Ohio, on a charge of obtaining two preparations of an exempt narcotic named Cosanyl within less than the 48 hour interval required by Ohio law. Basically the State attempted to prove only that the Petitioner had signed as a purchaser of Cosanyl in the exempt narcotics books of two different drugstores the same day. The pharmacists did not identify the Petitioner as the person who had purchased the Cosanyl and signed the books. The only evidence that the Petitioner was the person who had signed "E. Gordon" and the Petitioner's address was the testimony of a self-styled handwriting expert from the Columbus, Ohio Police Department [R. 61.] which was sharply attacked. [R. 62-68, 104.]

At the conclusion of his opening summation the prosecuting attorney commented during his last remark to the jury:

> "I would also like to call your attention that not one bit of this evidence has been contradicted in any way . . ." [R. 100.]

In his final summation the prosecuting attorney stated:

> ". . . not one person has taken the stand to say that anyone knew where this Defendant lived and *not one person has taken the stand to say that is not his signature on State's Exhibits 1 and 2.*" [R. 110.] (Emphasis added.)

A motion for a new trial was filed with the trial court. Point 1a of that motion was that the remarks of the prose-

cuting attorney were a violation of Petitioner's rights under the Fifth Amendment, the Fourteenth Amendment and *Griffin v. California.* [R. 124, 125.]

An appeal was taken to the Tenth District Court of Appeals of the State of Ohio. The comments of the prosecuting attorney were assigned as error in the Fourth Assignment of Error as violations of the Petitioner's rights under *Griffin v. California,* the Fifth Amendment and the Fourteenth Amendment. In its decision upholding the judgment below the Court of Appeals stated:

> "We find no error in the comments of the prosecutor in his closing argument (*United States vs. Johnson,* 337 F 2d 180, aff'd. in 383 U.S. 169; *United States vs. Wright,* 309 F 2d 735, cert. denied in 372 U.S. 929) and no reversible error committed under the other assignments.
>
> The judgment appealed from must be affirmed."

The federal constitutional issue was also presented to the Court of Appeals by two motions to reconsider and by a motion to certify the decision of the Court of Appeals in this case to the Ohio Supreme Court on the grounds that it was in conflict with the decision of another Ohio Court of Appeals in *State v. Murphy,* 13 Ohio App. 2d 159 on this same federal constitutional issue.

An entry affirming the judgment of the trial court was filed in the Court of Appeals on December 5, 1968.

An appeal was taken from the judgment of the Ohio Court of Appeals to the Supreme Court of Ohio. The notice of appeal was filed December 26, 1968. The appeal to the Supreme Court of Ohio was taken both by means of an appeal as of right and by means of a motion for leave to appeal. The only question presented to the Supreme Court of Ohio was the present federal constitutional question.

On May 21, 1969 the Supreme Court of Ohio overruled the motion for leave to appeal and dismissed the appeal as of right.

It is expected that the State will argue that this Petitioner waived his rights to raise the federal constitutional question by not objecting to the prosecuting attorney's comments while they were being made. There are three answers to this argument. 1. A rule requiring on the spot objections to comments by a prosecuting attorney on a defendant's failure to take the stand would be unjust and illogical if it existed. 2. Ohio does not have such a rule however. 3. The courts below did not require such an objection in the present case. Instead, the Tenth District Court of Appeals (which was the highest court to render an opinion in this case) clearly considered and decided the same constitutional issue we ask this court to consider. This is demonstrated by the language of the Court of Appeals stating "We find no error in the comments of the prosecutor in his closing argument . . ."

A rule requiring an objection to a comment on the defendant's failure to take the stand would be unjust. An objection by defense counsel or an instruction by the court on the prosecutor's misconduct would increase rather than decrease the danger of harm to the defendant.

Ohio has no rule requiring an objection to a comment on a defendant's failure to testify. Ohio requires objections when the trial court could have cured an error if it had been brought to the attention of the trial court. *State v. Glaros,* 170 Ohio St. 471. The Supreme Court of Ohio has held that the error which occurs when the prosecuting attorney comments upon the defendant's failure to testify is an error that the trial court cannot correct. *State v. Davis,* 10 Ohio St. 2d 136; *State v. Minamyer,* 12 Ohio St. 2d 67.

The Tenth District Court of Appeals therefore completely ignored the State's waiver argument and decided the federal constitutional question on its merits. This case therefore properly presents that federal constitutional question for the consideration of this court.

REASONS FOR GRANTING THE WRIT

1. The constitutional issue in this case presents for the consideration of this court a device which can and has been used to evade the rule announced by this court in Griffin v. California, 380 U.S. 609.

The constitutional issue was decided below on the theory that there is a distinction between comments on a defendant's failure to testify and comments on a defendant's failure to offer evidence. The Ohio Tenth District Court of Appeals cited *United States v. Johnson,* 337 F.2d 180, *aff'd* (on other questions) 383 U.S. 169; and *United States v. Wright,* 309 F.2d 735, *cert den'd* 372 U.S. 929 in holding that the prosecutor's comments in the present case were proper. Those cases hold that comments on a defendant's failure to offer evidence are proper despite a rule that comments on the defendant's failure to take the stand are forbidden.

Petitioner respectfully submits that there is no logical reason why a comment cannot be both a comment on the defendant's failure to offer evidence and a comment on the defendant's failure to take the stand. Consequently a rule that permits all comments on the defendant's failure to offer evidence encourages prosecuting attorneys to evade the *Griffin* rule by merely phrasing their comments on the defendant's failure to take the stand in the form of a comment on the defendant's failure to offer evidence.

The comments made by the prosecuting attorney in the present case illustrate how well a prosecuting attorney using this device can point out to the jury the defendant's failure to take the stand. Consider the obvious effect of the following comment on the defendant's failure to offer evidence:

> ". . . not one person has taken the stand to say that is not his signature on State's Exhibits 1 and 2." [R. 110.]

Consider also the impact of the following language which was upheld by a majority opinion in the Missouri Supreme Court in *State v. Baker,* 4 Crim. Law Reporter 2520, decided March 10, 1969. The prosecuting attorney had argued:

> "For whatever reason Mr. Baker may have had at the time, whatever fancy may have caught him, whatever his problem is, it is undisputed from this witness stand that he did it . . ." [4 Crim. Law Reporter 2520, at 2521.]

Justice Seiler of the Missouri Supreme Court dissented from the decision in *State v. Baker, supra,* and pointed out the effect of the decision on Missouri's own statute similar to the *Griffin* rule.

> "If we apply the statute so that it does not reach comment the clear effect of which is to point out that the defendant did not take the stand and dispute the charges, we . . . are, as a matter of its practical application in the trial of a criminal case, emasculating it." [4 Crim. Law Reporter 2520, at 2521.]

In jurisdictions where the distinction between comments on the defendant's failure to testify and comments on the defendant's failure to offer evidence is recognized there is nothing to prevent a careful prosecutor from making any comments he pleases on the defendant's failure to testify. In those jurisdictions the *Griffin* rule is merely a trap for the unwary prosecutor and will not control the conduct of the wary prosecutors.

Wary prosecutors can even study how to evade the *Griffin* rule in an A.L.R. annotation. 14 A.L.R. 3d 723 warns that there may be difficulties in some jurisdictions when the evidence could not have been contradicted by any person other than the defendant himself.

Except for that the prosecuting attorney is in:

> "a favorable tactical position. . . . [H]e need have little fear that his remarks will be regarded as constituting a hidden reference to the accused's failure to testify." [14 A.L.R. 3d 723, at 729.]

The annotation does suggest however that the prosecutor steer clear of repeating his statement too often, use the passive voice in his verbs, and avoid "making any specific identification of the defendant" as the one whose testimony is missing. [14 A.L.R. 3d 723, at 729.]

The attention of the court is also respectfully directed to the following statement in that annotation concerning the frequency and the importance of such comments by prosecutors:

> "Judging from the numerous cases reaching the reports in which statements of this kind have been made by the prosecution and attacked by the defense, most lawyers subscribe to the belief that such a comment is of great impact in inducing the average jury to bring in a verdict of guilty." [14 A.L.R. 3rd 723, at 729, footnote 1.]

Petitioner respectfully submits that this court should grant the writ in order to prevent deliberate evasion of the *Griffin* rule.

2. The decisions of the state courts and of the federal courts of appeals on the question presented by the constitutional issue in this case are in conflict and that conflict can only be resolved by this court.

The following courts have held that an argument by the prosecution that the defendant had failed to present evidence or that the prosecution's evidence was uncontradicted was a comment on the defendant's failure to take the stand: The United States Court of Appeals for the First Circuit in *Desmond v. United States,* 345 F. 2d 225; the Supreme Court of Alabama in *Street v. State,* 266 Ala. 289, 90 So. 2d 687; the Court of Criminal Appeals of Texas in *Watson v. State,* 171 Tex. Crim. 526, 352 S.W. 2d 120, and in *Traylor v. State,* 111 Tex. Crim. 58, 11 S.W. 2d 318 and the New York Supreme Court, Appellate Division, Second Department, in *People v. Norton,* 285 App. Div. 1165, 140 N.Y.S. 2d 382.

Similar comments have been upheld, however, by the

following courts: the United States Court of Appeals for the Fourth Circuit in *Davis v. United States,* 279 F. 2d 127 and *United States v. Johnson,* 337 F. 2d 180, *aff'd* (on other questions), 383 U.S. 169; the United States Court of Appeals for the Fifth Circuit in *Garcia v. United States,* 315 F. 2d 133; the United States Court of Appeals for the Seventh Circuit in *United States v. Wright,* 309 F. 2d 735 *cert. den'd* 372 U.S. 929; the United States Court of Appeals for the Ninth Circuit in *Leathers v. United States,* 250 F. 2d 159; and the Supreme Court of Missouri in *State v. Baker,* 4 Crim. Law Reporter 2520 (decided March 10, 1969) and in *State v. Perkins,* 382 S.W. 2d 701.

The State of Ohio itself is in conflict. Despite the holding of the Ohio Tenth District Court of Appeals in the present case, the only reported decision on the present question in Ohio, *State v. Murphy,* 13 Ohio App. 2d 159, forbids comment upon the defendant's failure to present evidence.

The conflict between these decisions cannot be resolved. It is a conflict between decisions which actually consider the natural effect and apparent purpose of the prosecutor's language and decisions that refuse to consider the natural effect of the prosecutor's language if any other interpretation of the prosecutor's language is possible.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GERTNER
Counsel for Petitioner.

APPENDIX—OPINIONS AND JUDGMENT BELOW

ENTRY IN THE SUPREME COURT OF OHIO ON THE APPEAL FROM THE COURT OF APPEALS MAY 21, 1969

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

ENTRY IN THE SUPREME COURT OF OHIO ON THE MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS MAY 21, 1969

It is ordered by the Court that this motion is overruled.

ENTRY IN THE OHIO TENTH DISTRICT COURT OF APPEALS FILED DECEMBER 30, 1968

This cause came on for consideration on an Application to Certify this Court's judgment of December 5, 1968, to the Supreme Court of Ohio, as being in conflict with the judgment of the Court of Appeals of the Second Appellate District of Ohio, Clark County, Ohio, *State of Ohio vs. Murphy,* reported in Volume 13, Ohio App. 2d 159. This Court finds that its judgment is not in conflict.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Application to Certify is hereby denied.

DECISION OF THE OHIO TENTH DISTRICT COURT OF APPEALS RENDERED OCTOBER 29, 1968

Per Curiam.

We have reviewed all of the proceedings in this case, including the constitutional matter noted in appellant's memorandum of October 14, 1968, and conclude that the application to reconsider must be denied.

The judgment appealed from will be affirmed.

DECISION OF THE OHIO TENTH DISTRICT COURT OF APPEALS RENDERED OCTOBER 8, 1968

Per Curiam.

Appellant has filed an application requesting us to reconsider our decision of September 10, 1968.

In the memorandum in support of his application, appellant strenuously asserts that the majority was wrong when it stated that no claim had been made, either on the motion for a new trial or in this appeal, that the two forms of Cosanyl were in fact on the market at the time concerned. Appellant further, and with equal vigor, states that "both forms of Cosanyl were on the market at the time concerned."

Our view of this entire record still convinces us that there was ample evidence to support the jury's verdict. However, the question of appellant's having received a fair trial is not to be lightly regarded and it is upon this point that we deem it appropriate to instigate the procedure suggested by the dissenting opinion. Appellant should, and shall, have his opportunity to establish the existence of a genuine factual dispute concerning whether these two forms of Cosanyl were both on the market at the time appellant is accused of having made the illegal purchase.

Article IV, Section 3 (B) (f) of the Ohio Constitution as adopted May 7, 1968, provides:

"(B) (1) The courts of appeals shall have original jurisdiction in the following:

"(f) In any cause on review as may be necessary to its complete determination."

In our opinion this provision permits this court in an appeal on questions of law to go outside the record under limited circumstances and for limited purposes. It is apparent that basic constitutional rights, such as the right to trial by jury, cannot be evaded by the exercise of this new ancillary original jurisdiction. We also deem it inappropriate and undesirable to involve this court in the resolution of a disputed fact issue. However, the present case seems to offer a situation where the new jurisdiction can be utilized.

Appellant and appellee may submit any documents permissible under summary judgment procedures (Section 2311.041, Revised Code), and which are directed to the issue of whether the non-narcotic form of Cosanyl was available to appellant on the market on the date of the alleged crime. If no such documents are filed, or if the documents filed show that there is no genuine issue as to the fact that such a preparation was not so available, then this court will determine that the admission of hearsay evidence as to that fact was nonprejudicial and will affirm the judgment of conviction.

If such documents are filed and they establish the existence of a genuine issue as to such availability, then this court will determine that the admission of hearsay evidence in this case constituted prejudicial error, and will reverse the judgment and remand the cause for a new trial.

Appellant will have Ten (10) days from this decision to file documents. Appellee will have Five (5) days to file any opposing documents.

DUFFEY, P. J., TROOP, and HERBERT, JJ., concur.

DECISION OF THE OHIO TENTH DISTRICT COURT OF APPEALS RENDERED SEPTEMBER 10, 1968

Per Curiam.

This is an appeal from a conviction for the illegal purchase of exempt narcotics.

One of appellant's main contentions concerns the trial court's admission of certain hearsay evidence. In our opinion, a reading of this entire record fails to establish that the trial court's overruling of appellant's objection and motion to strike constituted reversible error.

It has long been established that while any error is important, only that which clearly works to the prejudice of the objector should be the basis for reversal. (*Smith vs. Flesher,* 12 Ohio St. 2d 107; *State vs. Stanton,* 15 Ohio St. 2d 215) In the case at bar, appellant's counsel reflected his own view of the non-prejudicial nature of the court's error when he stated in closing argument:

> " * * * The important thing that I am stressing here is not whether it was made or dispensed on January 4, 1964, and by the way, I will tell you this summation I drew up before I even heard Mr. Marsh this morning, that is not the important thing, whether it was in existence at that time. The important thing is that if they can be so wrong in a preparation which exists today, which are sold today in drugstores can't they be mistaken about a lot of other things that happened almost four years ago? That is the importance of my question about the type of drugs sold. * * * "

We accept counsel's description of the purpose for which the evidence of a non-narcotic Cosanyl was presented. Witnesses Miller and Joseph had been positive in their belief that no non-narcotic Cosanyl was on the market, and also testified that the Cosanyl which they sold to the appellant within the prohibited span of time contained a narcotic. Counsel's cross-examination of witness Marsh and appel-

lant's other evidence cast some doubt upon the credence which should be attributed to the druggists' testimony and, as counsel stated in his argument quoted above, this was the important objective sought. That objective was attained, but the jury obviously still felt that the State's evidence was worthy of belief. No claim was made on the motion for a new trial or in this appeal that the two forms of Cosanyl were in fact on the market at the time concerned.

We agree that if counsel for the State acted in the willful and deliberate manner described by counsel for the appellant, a breach of ethical responsibility may have occurred. However, unless misconduct of trial counsel results in reversible error, an otherwise error-free trial should be allow to stand and counsel's methods dealt with in another forum.

We find no error in the comments of the prosecutor in his closing argument (*United States vs. Johnson,* 337 F. 2d 180, aff'd. in 383 U.S. 169; *United States vs. Wright,* 309 F. 2d 735, cert. denied in 372 U.S. 929) and no reversible error committed under the other assignments.

The judgment appealed from must be affirmed.

TROOP, and HERBERT, JJ., concur.

DUFFEY, P. J., dissents.

DUFFEY, P. J., dissenting.

It appears that the preparation in question is produced in both narcotic and non-narcotic form. There is evidence that pharmacists as a practice may cause a purchaser to sign the purchaser register upon purchasing either form, although registration is only required by law if the preparation contains narcotics.

On rebuttal, the state's witness testified that the non-narcotic form was not produced or sold at the time in question, but rather many months later. His testimony was clearly hearsay and not admissible. It also went directly to a critical point in the defense, i. e., whether or not either or both purchases made may have been non-narcotic prep-

arations. Counsel objected to the testimony and moved to strike. He has pressed the point of the improper evidence in this court and demanded the right to require the state to properly prove the date at which this preparation became available.

In argument to the jury, counsel did argue that the "important thing" was the fact that the state's witnesses were mistaken. Making the best case possible in the face of an error does not constitute a waiver of the error. Counsel's statement is not sufficient to establish a waiver of the right of cross-examination and confrontation on the evidentiary issue of the existence of a non-narcotic preparation at the time of the sales to appellant.

Article IV, Section 3 (B) (f) of the Ohio Constitution, as adopted May 7, 1968, grants original jurisdiction "In any cause on review as may be necessary to its complete determination." On that authority, this court can inquire into whether there is any genuine fact issue as to the existence of the non-narcotic preparation at the time of sale. In the absence of such an inquiry, the state of the record on review compels me to find prejudicial error. I therefore dissent.

DECISION OF THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO RENDERED SEPTEMBER 19, 1967

On September 11, defendant moved for a New Trial, after a verdict of Guilty on one count, for Exempt Narcotics, on September 8, 1967.

The first ground assigned was irregularity in the proceedings on the part of the Prosecuting Attorney. We hold this complaint is not well taken.

We believe the verdict was sustained by sufficient evidence.

The motion is OVERRULED.

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1969

No. 417

ERNEST LEE GORDON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION

C. HOWARD JOHNSON
Prosecuting Attorney
Franklin County, Ohio
Franklin County Court House
Columbus, Ohio 43215

and

DAVID H. BODIKER
Assistant Prosecuting Attorney
Franklin County, Ohio
Franklin County Court House
Columbus, Ohio 43215
Counsel for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, Columbus, Ohio 43216

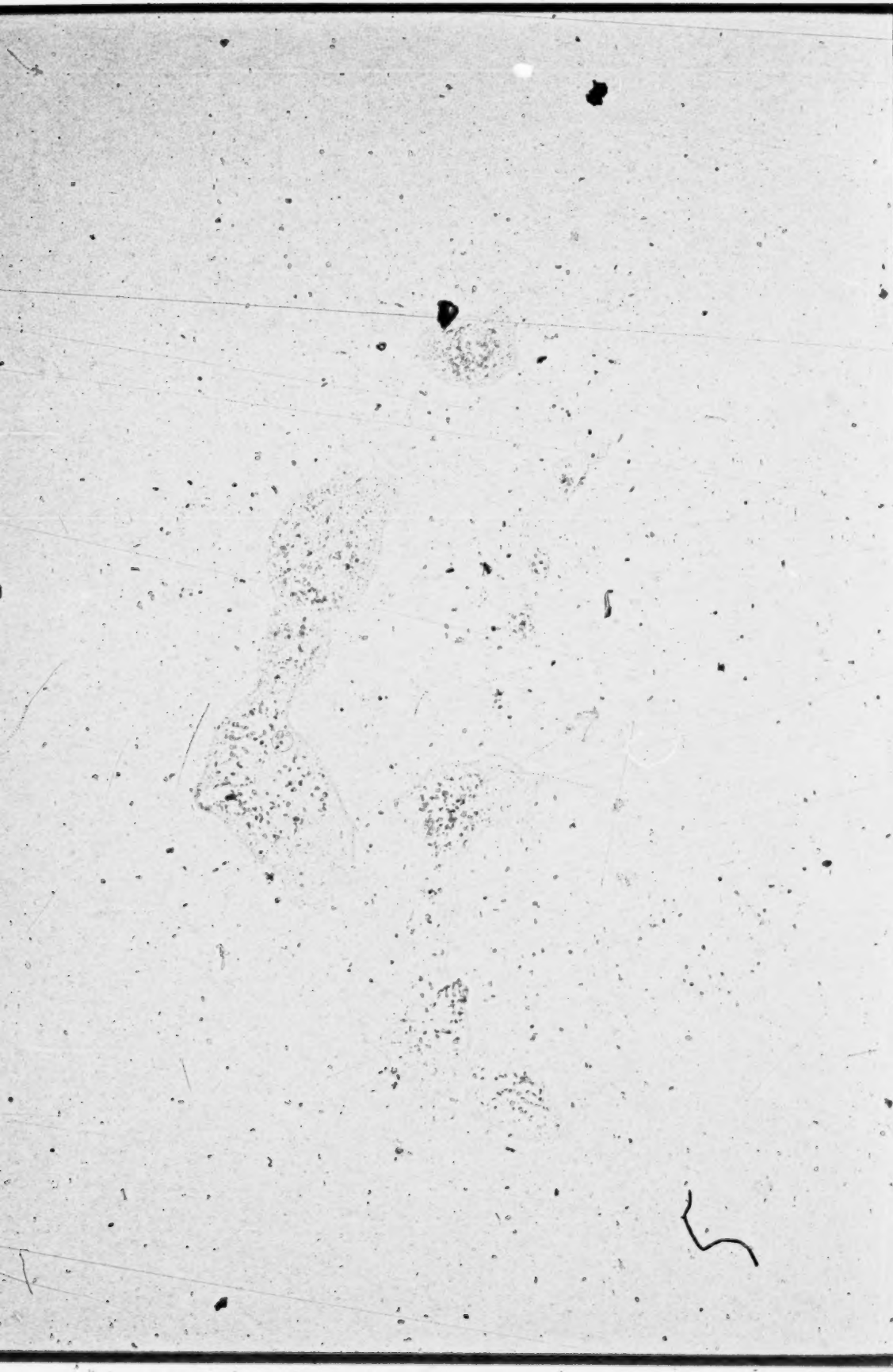

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
QUESTIONS OF LAW PRESENTED	5
LAW AND ARGUMENT	5
I. THE COMMENTS OF THE PROSECUTOR	5
II. THE WAIVER OF THE ERROR BY FAILURE TO OBJECT	10
CONCLUSION	14
AFFIDAVIT	14

TABLE OF AUTHORITIES

Douglas v. *Alabama*, 380 U.S. 415 11

Griffin v. *California*, 380 U.S. 609 (1965) 5, 6, 12

Henry v. *Mississippi*, 379 U.S. 443 11

O'Conner v. *Ohio*, 385 U.S. 92 12

Samuels v. *U.S.*, 398 F. 2d 964 12

State v. *Baker*, Missouri Supreme Court, 4 *Crim. Law Reporter* 2520, decided March 10, 1969 9

State v. *Childs*, 14 Ohio St. 2d 56 (1968), cert. den'd April 28, 1969, 89 Sup. Ct. 1596 11

State v. *Davis*, 10 Ohio St. 2d 136 10

State v. *Glaros*, 170 Ohio St. 471 11

State v. *Minamyer*, 12 Ohio St. 2d 67 (1967) 11

State v. *Murphy*, 13 Ohio App. 2d 159 (1967) 3, 10

United States v. *Johnson*, 337 F. 2d 180, 4th Cir., (1964) (aff'd in 383 U.S. 169 [1965]) 8

United States v. *Wright*, 309 F. 2d 735, 7th Cir. (1962) cert. den'd 372 U.S. 929 8

IN THE

Supreme Court of the United States

October Term 1969
No. 417

ERNEST LEE GORDON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

STATEMENT OF THE CASE

The petitioner, Ernest Lee Gordon, (hereinafter, the "defendant"), was directly indicted by the Grand Jury of Franklin County, Ohio, on May 18, 1964, for one count of violating Section 3179.16, Revised Code of Ohio, the exempt narcotics statute, in that he "did obtain under the exemptions of Section 3719.15 of the Revised Code, more than one preparation exempted by the provisions of that section within 48 consecutive hours." The indictment was filed on May 21, 1964, and the next day bond was set at $4,000.00 by the Court of Common Pleas and a capias issued to the Sheriff of Franklin County, Ohio, to bring in the defendant. The defendant was never found in the jurisdiction and on June 23, 1966, a capias was issued to the Chief of Police, New York City, New York, to arrest and detain the defendant who was apparently residing at 240 West 103rd Street in that city.

On January 25, 1967, return was made on the arrest order issued to New York City. The indictment was finally served on the defendant at the county jail and on January 27, 1967, he was arraigned on the charge, at which time he was represented by Attorney Abraham Gertner, and entered a plea of not guilty. The bond previously set had

been subsequently reduced to $1,000.00 by entry of the court and on January 30, 1967, the defendant was released on bond posted by the Maryland Surety Company.

A bill of particulars was provided defendant at request before trial. The first trial assignment was continued by agreement of the parties and the case was finally set down and tried on September 7, 1967, at which time the jury returned a verdict of guilty to the charge. A motion for a new trial was filed on September 11, 1967, and was overruled by decision of the court rendered on September 19, 1967, and subsequently journalized on September 27, 1967. On October 25, 1967, the defendant was sentenced to the Ohio Penitentiary and to pay costs; a $1,000.00 fine was suspended, and the defendant filed his notice of appeal from the judgment and sentence and remained free on appeal bond.

Five specific assignments of error were alleged by defendant in the Court of Appeals. The case was argued on April 16, 1968, and a decision was eventually rendered on September 10, 1968, affirming the judgment of the Court of Common Pleas and dismissing the appeal. An application for reconsideration was then filed by the defendant and by a decision of October 10, 1968, an opportunity was then afforded him by the Court of Appeals under the provisions of Article IV, Section 3 (B) (f) of the Ohio Constitution to produce additional evidence on the "hearsay" question (not presented in this petition).

The defendant thereafter filed a memorandum stating that such evidence was not available but further urged additional reconsideration by the court of the "constitutional problem" involved in the comment by the prosecuting attorney to the jury, which is the question now presented to this Court.

A third and final decision then was rendered by the court

on October 29, 1968, stating that the application for reconsideration must be denied. Defendant then moved successfully to stay execution and to remain on bond and after the judgment entry was journalized, filed a motion for the Court of Appeals to certify the judgment to the Ohio Supreme Court as being in conflict with the decision of another Ohio Court of Appeals in *State* v. *Murphy*, 13 Ohio App. 2d 159 (1967), on the question of prosecutor comment.

The application to certify was denied by the Court of appeals by entry of December 5, 1968, and thereafter defendant filed notice of appeal to the Ohio Supreme Court, both as of right and on motion for leave to appeal. The only question presented in the briefs and in argument was the matter of the comments of the prosecuting attorney during closing arguments and on May 21, 1969, the Ohio Supreme Court overruled the motion for leave to appeal and dismissed the appeal as of right.

A petition for a writ of certiorari was sought from this Court on this same question.

At the trial, the state's evidence consisted of the testimony of two pharmacists, Mr. Wayne C. Miller of Seelig's Pharmacy, and Mr. Stephen Joseph, Jr., who at the time of these events was employed at Tyler's Drugstore No. 1 at 1081 Mt. Vernon Avenue. Mr. Miller testified that on January 4, 1964, he sold a preparation of Cosanyl to a person who signed his name "E. Gordon" and his address "940 East 11th Avenue" on the exempt narcotics register and that he, Mr. Miller, initialed the register to indicate he made the sale. He further testified that the preparation was in the amount of four ounces and that it contained four grains of codeine. Mr. Joseph, the second pharmacist, testified to essentally the same matters, that on January 4, 1964, he sold four ounces of cosanyl to a person who signed "E. Gordon" and an address of "940 E. 11th Avenue," that he

also initialed the register and that four ounces of Cosanyl contains four grains of codeine.

The state also offered the testimony of Detective Stanley Grodell that he obtained the page from the exempt narcotics register from each of the drugstores in question on April 7, 1964, and that he had them in his possession or under his control since that time until presented at trial. He further testified that the Exempt Narcotics Register is a bound volume and that he obtained the pages in question by tearing them out of the book. Detective Grodell also testified that he had talked to the defendant about this matter and that Gordon did admit making purchases of Cosanyl but that he couldn't say when he made the particular purchases.

The state's final witness was Detective Fraley who qualified as a handwriting expert and who examined the signatures "E. Gordon" on the pages of the Exempt Narcotics Registers in question and compared them with a signature of the defendant obtained by Detective Fraley personally from the defendant at an earlier date. Detective Fraley testified that in his opinion these were all made by the same man and that the defendant did sign the pages of the Exempted Narcotics Register.

The defendant himself did not testify and the defense presented only the testimony of Theodore Schlonsky, a pharmacist for thirty years, who testified that there was both a narcotic and a non-narcotic form of Cosanyl manufactured by the Parke-Davis Company and produced a page from the Parke-Davis catalogue for December, 1965, to show that they were both offered for sale at that time. He further testified that "they are both put out the same way" (Tr. 80) and "they both look identical" (Tr. 80) and just to be on the safe side "without even thinking I record them both." (Tr. 88.) He did admit that the non-

narcotic preparation was clearly marked as such on the label and that the narcotic form was also identified by an "X" on the label to indicate its contents.

In rebuttal, the state produced Mr. Phillip R. Marsh, the field manager for Parke-Davis, who had been employed by them for twenty-five years. He testified that the non-narcotic form of Cosanyl was first manufactured for sale by Parke-Davis on October 11, 1965. He obtained this information by calling the branch office in Cincinnati that morning and talking to the officer manager. This testimony was objected to by defense counsel but was admitted by the court stating that the objection goes only to the weight of the evidence (Tr. 96).

This was all the evidence presented and the jury deliberated only briefly before finding the defendant guilty as charged.

QUESTIONS OF LAW PRESENTED

(1) Were the comments of the prosecuting attorney in this case in his closing argument to the jury merely comments upon the evidence produced or did they improperly call attention to the failure of the defendant to take the stand and as such violate his Fifth Amendment rights against self-incrimination as established in *Griffin* v. *California,* 380 U. S. 609 (1965)? (2) If the comments could be construed as a failure of the defendant to testify and were in violation of his rights under the Fifth Amendment did the defendant waive this error by his failure to object or in any way call the error to the court's attention at the trial stage so that remedial action could be taken before the jury's verdict was returned?

LAW AND ARGUMENT

I

The Comments of the Prosecutor

The defendant predicates his whole petition to this Court

upon comments made by the prosecutor during closing argument which he contends drew attention to the defendant's failure to testify and were in violation of defendant's Fifth Amendment rights as established in *Griffin* v. *California,* 380 U. S. 609 (1965). We might note that the first mention of these alleged violations occurred in the motion for new trial after the verdict of the jury had been returned and that no objections to the statements were made at trial at any time during the arguments or charge, so that if the prosecutor's comments drew the attention of the jury to the fact that the defendant did not testify they failed in any way to come to the notice of defense counsel who was present while all of this transpired and sat quiet, *although he in fact objected to the statement immediately preceding the offending comment.* (Tr. 100).

There is no objection in any way to the general proposition of law stated by the appellant as to the fact that no comment can be made upon the failure of the defendant to testify. It is felt, however, that nothing which was said or even intimated by the prosecutor in this case comes anywhere near such a comment nor could it be construed to be intended to be such comment as would justify the error and the prejudice now claimed by defendant.

The defendant bases his contentions upon two particular comments. The first of these occurred (at Tr. 100) in the first part of the prosecutor's summation to the jury. After outlining the function of closing argument and the significance of the indictment, the prosecutor reviewed the evidence in the case, witness by witness, and closed by saying:

> "I would also like to call your attention that not one bit of this evidence has been contradicted in any way, and I believe if you base your decision upon the evidence presented that there is only one verdict you can return . . ." (Tr. 100).

Defense counsel then started with his argument and ap-

parently was not then of the opinion that this had been a comment on the defendant not testifying, since, not only did he not object or comment, but he proceeded to dispute the fact that the evidence was not contradicted.

> "Let's recall, what was this evidence which the Prosecuting Attorney says has not been contradicted. What was this evidence?" (Tr. 101).

Counsel then proceeded to analyze all the evidence in the case and the particular merits of each kind of evidence. He specifically went into the question of handwriting and commented upon the weakness of the state's testimony and Detective Fraley's preparation for trial. (See for example Tr. 104, 105, 106).

> "Now, what about the expert, Sgt. Fraley? He didn't say it was written by the same man. He said the signatures appeared to be the same . . ." (Tr. 104) . . . "I was amazed at Sgt. Fraley's form of testimony." (Tr. 104).
>
> * * *
>
> ". . . but to pin an entire identification on a handwriting expert alone, this is the most horrible thing in the world." (Tr. 105).
>
> * * *
>
> "This is the weakest most flimsy form of evidence. Now what actually happened in this case? What took place?" *Somebody put E. Gordon's name down. Somebody knew where he lived.*" (Emphasis added.) (Tr. 106).

The second comment which appellant now objects to and finds reprehensible was in fact a direct reply to the above statements. Beginning at page 109 of the trial record the prosecutor replied to Mr. Gertner's assertions about the evidence:

> "Like I said, no matter what I say or Mr. Gertner says what you should believe, unless there is some evidence in the record to substantiate it you are entitled to consider it and . . ."

Then begins the alleged offending comment:

> ". . . not one person has taken the stand to say that

anyone knew where this defendant lived and not one person has taken the stand to say that it is not his signature on State's Exhibit 1 and 2." (Tr. 109).

The further comments of the prosecutor in reply, were not only entirely proper in their own right as comments solely on the weight of the evidence in the case, but were also necessitated as response to the defense counsel's assertions in his own argument.

In the case of *United States* v. *Johnson*, 337 F. 2d 180, 4th Cir., (1964), aff'd in 383 U. S. 169 (1965), the prosecutor argued that the defendant had presented no defense in the case and that he had produced no evidence to deny or contradict the charges against him. The 4th Circuit Court of Appeals characterized these statements as a "review of the testimony" and not "a forbidden comment on the failure of the defendants to testify," the prosecutor, there, as here, addressed himself to the absence of anything in the record to contradict the state's version of the case and under the circumstances such comment was not considered improper.

This distinction was clearly maintained in the case of *United States* v. *Wright*, 309 F. 2d 735, 7th Cir., (1962), cert. den'd 372 U. S. 929. The Court of Appeals there cited approvingly those cases which said that the prosecutor may properly call attention to the fact that the testimony of the government witnesses had not been contradicted. It further said that the Fifth Amendment's exclusion of comment about a defendant's failure to take the stand "must be interpreted in the light of reason and it must appear that 'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' *Knowles* v. *United States*, 224 F. 2d 168, 170 (10th Cir. 1955)." at p. 738.

The Seventh Circuit did make an exception for those cases where the accused himself is the only one who could possibly contradict the testimony, and the defendant, herein, has contended for such interpretation of the comments in this case. The defendant, however, is certainly not the only one who can testify to his handwriting, and defense counsel himself even made this argument in his closing statement to the jury when he discussed and explained the manner and means of proof of handwriting in will contest cases, including the calling of witnesses to the signature, in what was an obvious effort to undermine the testimony of the state's handwriting expert. (Tr. 104, 105).

More recently the Missouri Supreme Court has also held that reference by the prosecutor to "undisputed evidence" was not a comment on the defendant's silence. The court pointed out that many similar remarks have withstood judicial scrutiny and cited a number of Missouri cases where comments such as "we have testimony undenied and undisputed . . ."; ". . . they have offered no defense to you," and "the only evidence in the case is the evidence that the state produced," have been approved. See *State* v. *Baker,* Missouri Supreme Court, 4 *Crim. Law Reporter* 2520, decided March 10, 1969.

The defendant argues in his petition that comment on the absence of evidence of any kind should be proscribed since it provides the opportunity for "wary" prosecutors to deliberately evade the *Griffin* rule. This seems a poor predicate for a constitutional rule. Certainly deliberate evasions of constitutional obligations cannot be condoned, but any standard presented is susceptible to circumvention and the question of the "intent" of the prosecutor or the "effect" on the jury is one which can best be decided by the trial court under the standards presently existing.

II

The Waiver of the Error by Failure to Object

As we have previously noted, the defendant did not find the allegedly tainted comments so clearly prejudicial to make objections to them at trial and to attempt to obviate the harm, if there were any, by having the court instruct the jury to disregard them. Nor did he pursue the path taken by defense counsel in *State* v. *Murphy*, 13 Ohio App. 2d 159 (1967), which he has used to substantiate his position in this petition, which was to approach the bench and move for a mistrial out of the hearing of the jury. The challenge to the prosecutor's statements did not take form at all until after the jury had returned its verdict and the reaction was just too late. Whatever prejudicial effect may have existed or been caused by the comment has been waived.

The defendant has anticipated this argument by the state and has asserted various reasons why waiver would not be applicable in this case. None of these is justifiable.

The courts below did not require an objection to be made *because they never got to the issue.* No one found that the questioned comments were even objectionable in the first instance so the issue of waiver was irrelevant. No pronouncement of any kind was ever made about "waiver" and the defendant's assertion in his brief that the Court of Appeals "ignored the State's waiver argument" is pure speculation.

The assertion that Ohio does not have a rule requiring objection to a comment is inaccurate. The cases cited in support of the proposition are inapposite. *State* v. *Davis*, 10 Ohio St. 2d 136, involves a situation where the defendant did testify at trial, but was reversed because the prosecutor commented in closing argument that the defendant failed to testify at preliminary hearing. The argument was objected to at the time and a curative instruction

was given by the court, but the Ohio Supreme Court said this charge could not correct the error.

In *State* v. *Minamyer*, 12 Ohio St. 2d 67 (1967), the prosecutor took the stand and testified to the fact that the defendant refused to testify at the grand jury. Upon objection, the court instructed the jury to ignore the testimony, but again the Ohio Supreme Court found that the charge did not cure the error.

The rule in Ohio was properly stated in *State* v. *Glaros*, 170 Ohio St. 471, and recently approved in *State* v. *Childs*, 14 Ohio St. 2d 56 (1968), cert. den'd April 28, 1969, 89 Sup. Ct. 1596:

> "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.
>
> "A practice should not be permitted where counsel could place his client in a position where he could take advantage of a favorable verdict and at the same time avoid an unfavorable verdict merely because of an error that counsel made no effort to prevent."

The state does have a legitimate interest in the orderly conduct of trials by the prevention of costly delays and by discouraging defendants from making erroneous records and allowing them an option after the verdict. This state interest in the timely objection requirement has been recognized by this Court in other cases. *Douglas* v. *Alabama*, 380 U.S. 415, *Henry v. Mississippi*, 379 U.S. 443. And constitutional rights may be lost as finally as others. "Counsel may, under some conditions where the circumstances are not exceptional, preclude the accused from asserting constitutional claims." *Henry* v. *Mississippi*, *supra*, at p. 451.

This was also clearly shown in the case of *Douglas* v. *Alabama*, 380 U.S. 415 (1965): "In determining the sufficiency of objections we have applied the general principle

that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take the appropriate corrective action is sufficient to serve legitimate state interests and therefore sufficient to preserve the claim for review here. *David* v. *Wechster*, 263 U. S. 22, 24; *Love* v. *Griffith*, 266 U. S. 32, 33-34;'' at p. 423. In *Douglas* this Court recognized the need for state procedural standards, but ruled that the objections which were made were sufficient to comply with those state rules and to present the issue on review, even though such objections were not strictly in compliance with that state's procedures. Here, there is no compliance whatsoever with procedural prerequisites and the conclusion is inescapable that any further objections are waived and that there is no basis to predicate review.

Recently the United States Court of Appeals for the 5th Circuit in *Samuels* v. *U. S.*, 398 F. 2d 964, on August 5, 1968, examined in detail the question of the lack a timely objection to a prosecutor's comment and concluded that the trial inaction precluded an attack on appeal.

The Court specifically held that *O'Conner* v. *Ohio*, 385 U. S. 92, not only does not obviate the need for a timely objection to the prosecutor's comment but actually reaffirms such need and constitutes only a specific exception to it. Since the *O'Conner* trial occurred before *Griffin*, this Court held that the defendant could not be required to have anticipated the application of the Fifth Amendment to the states so as to be required to object. In *Samuels*, *supra*, the Fifth Circuit noted that this Court had ''carefully refrained from any all inclusive language which would obviate the necessity to object in all cases.''

The Court of Appeals went on to find that where no objection was made until after argument was concluded, the objection was not timely. The appellant (defendant)

could obtain relief in this federal case "only if the remark was so flagrant as to constitute plain error within the meaning of Rule 52(b), F. R. Cr. P."

In deciding what was flagrant the Court said: "In determining whether the prosecutor's remark constitutes plain error, we must first consider whether the statement here in question was in fact a comment on the accused's failure to testify. In doing so we look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury. *Davis* v. *United States*, 357 F. 2d 438 (5th Cir. 1966)."

In view of the nature of both closing arguments in this case and the actual remarks of the prosecutor it is clear that the comments now objected to were not "flagrant" and were not such as would constitute "plain error" in Federal Court. The Fifth Amendment right asserted provides only that there will be no comment on the failure to testify, and not only failure to produce evidence. These could in a given case coincide, but here the question of evidence was argued and the prosecutor was well within bounds in evaluating and weighing all evidence in the case, especially the absence of contradictory evidence by the defendant.

The defendant does assert that by objecting to the statement he would serve only to reenforce the effect of the prosecutor's comment and make the damage sustained irreparable. He justifies his silence on this basis and tacitly, at least, suggests that his actions were purposeful and knowing. We have previously pointed out that he did object to the statement immediately preceding the now-questioned comment, and that he could also have quietly approached the bench, even after arguments were concluded, and requested the court for a mistrial on the basis of what had transpired.

Such error as existed, if such did exist at all, could at least have been argued and perhaps corrected during the trial stage of the case. Defendant chose, apparently knowingly, to take his chances with the jury instead and he must now be bound by his decision.

CONCLUSION

For the foregoing reasons the State of Ohio respectfully urges that the writ requested in defendant's petition be denied.

.....

DAVID H. BODIKER
Assistant Prosecuting Attorney
Franklin County, Ohio
Attorney for Respondent

AFFIDAVIT

STATE OF OHIO
FRANKLIN COUNTY, ss:

David H. Bodiker, being duly sworn, deposes and says that he is an Assistant Prosecuting Attorney for Franklin County, Ohio, and that a copy of the foregoing Brief In Opposition has been mailed to the Attorneys for Petitioner, Abraham Gertner and Walker J. Blakey, 37 West Broad Street, Columbus, Ohio 43215, this ..... day of September, 1969.

.....

DAVID H. BODIKER

Sworn to before me and subscribed in my presence this ..... day of September, 1969.

.....

Notary Public